IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1410~~ 179

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

UNITED INSURANCE COMPANY OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ISAAC N. GRONER
1730 K Street, N.W.
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:

ALAN Y. COLE
COLE and GRONER
1730 K Street, N.W.
Washington, D. C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

UNITED INSURANCE COMPANY OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Insurance Workers International Union, AFL-CIO ("Union"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on December 21, 1966.[1]

---

[1] The Solicitor General, on behalf of the Board, has filed a petition for a writ of certiorari seeking review of the same judgment. No. 1409, October Term, 1966.

OPINIONS BELOW

The Decision and Order of the National Labor Relations Board ("Board"), is printed in the Joint Appendix filed in the Court of Appeals, nine copies of which have filed with this Court, and is reported at 154 NLRB 38 (1965). The Opinion of the Court of Appeals, printed in Appendix A, *infra,* p. 1a, is reported at 371 F. 2d 316 (1966).

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1966. On May 20, 1967, Mr. Justice Clark signed an Order extending the time for the filing of this Petition to and including May 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); and that of the Court below, under 29 U.S.C. § 160.

QUESTION PRESENTED

Whether the Board may find workers to be "employees" rather than "independent contractors" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.* ("Act") when many of the controls which management imposes upon them are inherent in the nature of the business and when their duties include collections and sales in the field so that they spend much of their working time outside the immediate physical supervision of the management.

STATUTORY PROVISIONS INVOLVED

The statutory provisions primarily involved are those of the Act. Pertinent excerpts from Sections 2(3), 7, 8(a)(1) and (5), and 10(e) and (f) of the Act are set forth in Appendix B, *infra,* p. 24a.

STATEMENT

This case presents significant questions as to the interpretation and scope of the exception of "an independent contractor" from the definition of an "employee" entitled to the protection and coverage of the Act (Section 2(3), set out *infra,* p. 24a), in the context of a refusal to bargain case. Subsequent to August 14, 1964, when the Board certified the Union as the appropriate bargaining unit of the debit[2] insurance agents employed by Respondent, United Insurance Company of America ("Company"), in its Districts in Baltimore City and Anne Arundel County, Maryland, the Company refused to bargain on the ground that these agents were "independent contractors" and not "employees" within the meaning of the Act; and the Board issued a Complaint charging the Company with violation of Sections 8(a)(1) and (5) of the Act, in sum refusal to bargain. The significant facts of record, using "facts" to denote the objective and particularized description of what agents and their supervisors have done, said or written, are not in dispute. There is no dispute of "facts" in that sense for present purposes, as between what the Board and the Trial Examiner found, on the one hand, and what the Court below found or assumed, on the other—although there are, of course, decisive disagreements as to the legal characterization and pertinence of particular facts, and as to the ultimate conclusion of whether these agents are employees or independent contractors. The pertinent facts may be summarized as follows.

---

[2] The word "debit" is generally used to signify either the group of policyholders whose premiums have been assigned to the particular agent for collection and servicing, or the geographic area within which the bulk of those policyholders is concentrated.

1. These agents are not on their own in the sense of being independent businessmen and having or operating their own businesses. They do not hold themselves out to the public as being independent contractors or entrepreneurs. They have no business name or business legal status independent of the Company. They have made no capital investment and have no required overhead expenses to meet; by definition, therefore, they cannot make any "profit", using that term either as return on investment or as net excess of revenue over cost of doing independent business. The only risk confronting these agents is that they will lose their jobs with the Company; there is no other economic risk, no capital risk, which is characteristic of their work.

2. These agents spend most of their working time in the field, generally alone, removed from the immediate physical presence of management, within the confines of their debit, collecting premiums from the current policyholders of the Company and endeavoring to sell them and others new insurance. When a new agent is hired he is given a debit which includes already existing Company policyholders and prospects. These agents do not own their debit; an agent may not sell or assign or otherwise deal with the debit or any of the insurance business thereon as his own and when he leaves he must return it all to the Company. These agents did not select the debit system as the manner and means of carrying on this business; the Company did so unilaterally, as the best way of operating its debit insurance business.

3. These agents have no independent business office, address or telephone listing. They are assigned to a particular district office of the Company; and that

office encompasses the only business office space they use (they may have a work area or cubbyhole in their homes for which they may take a tax deduction) and the mailing address, office services, business telephone number, and forms and records which they use. They do not own or pay rent, salaries or any of the expenses of their district office. Nor did they select the district office system as the manner and means of carrying on this business; the Company did so unilaterally, as the best way of operating its debit insurance business.

4. Instead of being on their own, these agents constitute an integral and inseparable element in the Company's entire organization and administrative hierarchy and apparatus. Each of these agents is assigned not only to a particular district office, headed by a particular manager, but, in addition, to a particular staff, headed by a particular assistant manager. The number of agents assigned by the Company to each district and to each staff is small enough to insure a close relationship—intimate knowledge by management of what each agent is doing and how he is doing it. There are about twenty agents in each district. Each assistant manager has a staff of five agents. The Company decided unilaterally that five or six was the proper number for assistant managers to work with.

5. The Company subjects these agents to the direct physical presence of management officials, in two principal ways. One is the Company's requiring all agents to report to their district offices on a particular morning each week. When the agents report each week, they submit reports which management checks to determine how the agents are performing their work. The reports include both the financial or collection function; and the submission of applications for new

business. In both cases, management reviews the forms and directs that changes and corrections be made to their satisfaction. Further, the Company regularly assigns assistant managers and special writers, as their principal function, physically to accompany agents as the agents do their work on their debits.

6. The authority of these agents is limited and defined by the Company. The insurance policies which these agents sell are the Company's and the Company's alone; and the prices or premiums which shall be charged are determined by the Company. These agents have no title to the policies nor are they empowered to make "deals" to conclude individual sales.

7. These agents are not on their own in the sense of having any other means of a livelihood or any real bargaining power vis-a-vis the Company. They are full-time employees dependent on their jobs as agent for this Company for their livelihood. To become an agent, no experience, education or training is required. The Company provides whatever training it deems desirable for its own purposes, and not only for the new agents; the established agents also are subjected to Company training and exhortation, through the media of the weekly meeting and the physical accompaniment of agents on their debits.

8. The rates of compensation for these agents are determined unilaterally by the Company. The agents are not consulted and there is no negotiation between Company and agents. As to the mechanics of payment, while the agents remit only a net amount of money from their collections, the Company checks the reports and withholdings to insure that only the amount it considers correct has been withheld.

9. The relationship between these agents and the Company is not *ad hoc* or transitory. The Company makes length of service a factor in the computation of certain commissions, and pensions and other rights as well; and in general, encourages prolonged service by agents, in its own interest.

10. Agents are asked for their resignation—are fired, for all practical purposes—whenever the Company finds their performance inadequate. The record contains a letter from the Company advising approximately half of these agents as follows, "if any agent believes he has the power to make his own rules and plan of handling the company's business, then that agent should hand in his resignation at once, and if we learn that said agent is not going to operate in accordance with the company's plan, then the company will be forced to take the agent's final."[3]

Decision of Board

On May 13, 1965, the Trial Examiner issued his Decision, in essence finding these agents to be employees and concluding that the Company had violated the Act by refusing to bargain with the Union. On July 28, 1965, the Board issued its Decision and Order; it adopted the findings and conclusions of the Trial Examiner, with one qualification. The Board declared, "In adopting the Trial Examiner's ultimate conclusion, we do not rely on his observation as set out in footnote 26 of his Decision that the demeanor of the debit agents toward admitted supervisors during the hearing was one indicating an employer-employee

---

[3] Respondent's Exhibit 29, Record before the NLRB, which has been lodged with the Clerk of this Court.

relationship."[4] In his footnote 26, the Trial Examiner had raised the question of whether off-stand demeanor was entitled to be considered. His doubt that such evidence could be considered was expressed in the text to which the footnote was appended. The entire matter was expressly dictum inasmuch as his preceding sentence referred to "the demeanor of the parties representatives and their witnesses, which I observed during the 8 days of hearing and which I cite in addition to the other and *themselves sufficient* bases for my findings."[5]

Court of Appeals Decision

The Court of Appeals declared that these agents were independent contractors and not employees; and therefore reversed the Board and refused to enforce its Order. The Court relied upon its decision in a prior case, *United Insurance Company of America* v. *N.L.R.B.*, 304 F. 2d 86 (7 Cir. 1962), which is printed in Appendix A, *infra,* p. 16a. In both the instant decision and the former decision, the Court was much impressed that the Company desired that these agents be considered independent contractors, and also upon the statement that each agent is "on his own."

Moreover, the Court derogated many of the factors upon which the Board relied, with the assertion that they were inherent in the nature of the business. For example, the Court swept to one side all the evidences of control which were admittedly supported by substantial evidence with the following observation: "They are not indicative of an existence or exercise of control

---

[4] 154 NLRB at 38, n. 2.

[5] *Id.* at 48 (emphasis added).

directed to the 'manner and means' by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors."[6] Likewise the Court disregarded the evidence that Company control was required for transfer on the ground that "Both from the standpoint of the extent of the area in which an agent is to have responsibility for premium collections, and for the purpose of financial accounting with the agent, Company concern with such transfers and its need for knowledge of the same is readily apparent."[7] Identically, the Court denied probative force to the evidence that the assistant managers accompany the agents and service the agents' debits when their agents are absent, upon its statement that:

> "The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing and collection is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would, in the absence of corrective action require termination of the relationship in either case."[8]

---

[6] Appendix A, p. 10a, *infra*, 371 F. 2d at 322.

[7] *Id.* at 11a, 323.

[8] *Id.* at 12a, 323.

Identically, the requirement that these agents report weekly to the office and attend sales meetings was thus asserted to be neutralized in legal effect:

> "The continuity of the relationship involved and the mutual interest of the parties in the result to be obtained make it imperative that the agents be kept informed with respect to changes in the insurance contracts the Company offers and desirable that they be made aware of incentive programs sponsored by the Company to stimulate sales efforts."[9]

In general, the Court, while adopting the rubric of the "substantial evidence" test—whether there is substantial evidence to *support* the Board's findings—made clear that its review was in truth directed to finding factors "consistent with an independent contractor status"[10]—to searching for some plausible grounds for overturning the Board's findings.

To muster further support for its unusual approach to judicial review of a Board decision, the Court went on to treat the Trial Examiner's incidental dictum about off-stand demeanor as vitiating all the Board's findings of fact. The Court actually held that the dictum, which the Trial Examiner had expressly declared he was not relying on and which the Board had expressly disavowed, revealed the record "undesignedly" to be "tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order."[11]

---

[9] *Ibid.*

[10] *Id.* at 10a, 322.

[11] *Id.* at 15a, 324.

REASONS FOR GRANTING THE WRIT

1. This case presents the question of general importance in the administration of the Act of whether debit insurance agents, and indeed all employees who work in the field on collections or sales functions, may be held by the National Labor Relations Board to be "employees" and thus subject to the protection of the Act. They cannot be, if the decision below is allowed to stand. For the grounds upon which the decision rests are not and cannot be confined to this particular employer or this particular record.

A. As the above Statement indicates, one of the express and fundamental grounds of the decision of the Court below, adverted to in instance after instance to derogate the items of control which the Board had found the Company exercised and reserved with respect to these agents, was that the particular controls were inherent in the nature of the business. By definition, then, the decision extends to the entire debit insurance industry, and, indeed, to all collection and sales activities where a Court of Appeals asserts that the inherent nature of the work requires the close controls demonstrated on the record and relied upon by the Board.

This Court should clarify the appropriate legal tests for determination of "employee" and "independent contractor" status for the purposes of the Act. Under appropriate legal standards, is the Board, and the Court of Appeals in reviewing the Board, permitted or obligated to accept each element of factual evidence of exercise or reservation of the right of control over the workers and the work as some evidence of employee status; or may the Board or the Court of Appeals dis-

characteristic of Respondent Company. Invariably, a debit insurance company requires the agent to make none of the investment and assume none of the capital risk, and to expend no money (other than for transportation to his place of work, an expense incident to most employment), in order to obtain or to hold his position as an agent. Invariably, the agent needs no particular experience or schooling to be employed; is given a debit when he is employed and may not take the business with him when he leaves; is not authorized to vary any of the policy or premium terms prescribed by the Company; and lacks the attributes of independent entrepreneurship.

Typical findings about debit insurance agents, made by the Board in legal contexts addressed to other issues than employee-independent contractor, demonstrate the close similarity between the debit agents' work, whatever the company, and the characteristics of the work of the agents involved in this case. As to the debit agents employed by The Prudential Insurance Company of America, for example, the Board found, "The employees here involved are insurance agents, not factory production workers. Their general duties are to sell and service insurance policies. No particular time or place for such employee services are required by the employer." *Insurance Agents' International Union,* 119 NLRB 768, 783 (1957), *reversed on other grounds,* 104 U.S. App. D.C. 218, 260 F. 2d 736 (1958), *affirmed,* 361 U.S. 477 (1960). In *Metropolitan Life Insurance Company,* 138 NLRB 512, 514 (1962), also, the Board found, "Most of a debit agent's time is spent away from the office." The similarities among debit insurance agents are such that the Board has fashioned general principles of appropriate bar-

gaining unit determination applicable to such agents. *Metropolitan Life Insurance Company,* 156 NLRB 1408 (1966), *upon remand, Metropolitan Life Ins. Co.* v. *Labor Board,* 380 U.S. 438 (1965); *Quaker City Life Ins. Co.,* 134 NLRB 960 (1961), *enforced,* 319 F. 2d 690 (4 Cir. 1963).

There can be little doubt that insurance companies will be alert to avail themselves of opportunities presented by the decision below to defeat or delay collective bargaining with representatives of debit insurance agents, with the defense of independent contractor. During earlier days, they raised the independent contractor defense until it appeared laid to rest. See, e.g., *Metropolitan Life Insurance Company,* 43 NLRB 962, 964-965 (1942); *John Hancock Mutual Life Insurance Company,* 26 NLRB 1024, 1033 (1940); *The Western and Southern Life Insurance Company,* 56 NLRB 859, 860-861, 872-883 (1944).

Accordingly, the rights of the 100,000 debit agents in this country [13] under the Act will be impaired if not ultimately destroyed, if this Court should not review this decision. In addition, the rights under the Act of all employees whose principal duties are sales or collection in the field will be jeopardized. This case presents questions affecting the administration of the Act which are of general importance warranting consideration and elucidation by this Court.

---

[13] This is the best estimate, on the basis of Union data and experience. There were 233,000 persons employed in the "Insurance agents, brokers, and services" industry in 1965, according to the *BLS Employment and Earnings and Monthly Report on the Labor Force.* We are advised there is no breakdown available of this figure.

regard any demonstration of control because either the Board or the Court regards that control necessary in the business or industry involved? Petitioner believes the provisions and purposes of the Act impel the conclusion that each evidence of the reservation or exercise of the right of control is evidence of employee status; and that a Court of Appeals may not neutralize and disregard such evidence and finding by the Board, as the Court below has done, on the ground that the controls are the result of the necessities of the business. Those necessities may explain the practical cause, but should not define the legal effect, of the controls reserved and exercised.

It may well be that the debit insurance industry, and likely all businesses which include substantial collections and sales work in the field, requires such extensive reservation of control by management over those doing the work as to make almost inevitable the legal conclusion that they are employees.[12] But to permit a Court of Appeals to exclude such evidence on that ground is tantamount to permitting it to decide whether a certain group of employees is entitled to the protection of the Act on the basis of the Court's own private preferences and prejudices, rather than the

---

[12] "A strict system of supervision is necessary in the industrial insurance field in order to make sure that each agent is performing his task properly." Maurice Taylor, *The Social Cost of Industrial Insurance,* 114 (Alfred A. Knopf; 1933); R.W. Lederer, *Home Office and Field Agency Organization-Life,* 235 (Life Office Management Association; *rev. ed.* 1966); M.E. Davis, "Modern Industrial Life Insurance," in David McCahan, *Life Insurance Trends in Mid-Century,* 115, 122 (University of Pennsylvania Press; 1950); F. L. Hoffman, "Industrial Life Insurance," in H. P. Dunham, *The Business of Insurance,* vol. 1, at 468 (Ronald Press; 1912).

objective evidence and the terms and policy of the statute as enacted by the Congress.

B. Further, the Court below was much persuaded by the concept that the agent is "on his own." It is not precisely clear what the Court means; this may be only a shorthand summary of the result of finding them to be independent contractors, and the phrase may thus bear no particularized denotation. Perhaps more likely, the Court below was relying upon two different aspects of the agents' work. One is that they may set their own hours of work (of course in relation to their clients' needs and availability)—with the exceptions, derogated by the Court as indicated above, of the required weekly reporting to the district office and management's scheduling of work in relation to its accompaniment of the agents on their debits. Or the Court may have been referring to the fact that the agent spends most of his working time on his debit, physically removed from the immediate presence of his supervisor. Whatever the Court meant, the circumstances of this work which it had in mind are patently not unique to these agents, but are characteristic of debit insurance agents in general.

Furthermore, the other attributes of this relationship which the Court recited in its opinion are typical of the relationship between the debit insurance agents and their companies generally. In general throughout the debit insurance industry, the unit of administration and organization of the agents' work is the district office, supervised by a manager who is assisted by a number of assistant managers. There would be no company in which the number of agents assigned to an assistant manager is smaller than the five which is

2. The decision below is in conflict with pertinent decisions of this Court. The decision below did not in fact accord to the Board that full measure of judicial deference to the Board's finding of fact and its expertise in the field of industrial relations which has been prescribed by this Court, both in general, *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474 (1951), and in particular with regard to the employee-independent contractor issue, *Labor Board* v. *Hearst Publications,* 322 U.S. 111 (1944). It remains true, as this Court declared in the latter case but the Court below transparently overlooked, that the term "employee" as used in the Act, "like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship." [14] This Court has recently adverted to the special expertise of the Board in applying the statutory terms of the Act. *Hanna Mining* v. *Marine Engineers,* 382 U.S. 181, 190 (1965). While the opinion of the Court below includes general discussion, as if by rote, of the *Universal Camera* principle, an informed analysis of the decision reveals that it in fact accorded no weight, or egregiously inadequate weight, to the findings of fact made and relied upon by the Board.

Similarly, the Court below manifestly disregarded the holding and rationale of this Court, in *United States* v. *Silk,* 331 U.S. 704, 719 (1947):

> "* * * where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks.

[14] 322 U.S. at 129.

> They hire their own helpers. * * * It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.'[15]

Upon the facts of this case, as recited by the Court below as well as the Board, these agents have no responsibility for investment or management; they are not small businessmen; they own no capital assets or tangible resources; they hire no helpers; they undertake no economic risk (except that of losing their jobs); they exercise no control over the fundamental manner and means of performing this work, such as the debit system itself, the district office organization for carrying on the business, the timing and contents of the reports required and the scope and price of the services offered; they have no opportunity for profit. They are obviously not independent contractors, within any legitimate range for judicial review of the Board's findings.

Furthermore, the decision below cannot be reconciled with *Capital Life and Health Ins. Co.* v. *Bowers,* 186 F. 2d 943, 945 (4 Cir. 1951), where the Court had the following to say with respect to the debit insurance business and the employee status (for purposes of the Social Security Act as it stood in 1948) of debit insurance agents: "Long experience of the taxpayer and other companies in this field has resulted in the adoption of methods and forms best suited to the business which leave little discretion to the agents * * *."[15]

[15] There would appear to be no practical possibility of conflict among the circuits as to the status of the debit insurance agents of the Company. In the instant case, the Union filed a petition for review with the District of Columbia circuit, prior to the time that

The clarification of the application of the "independent contractor" exception is an issue of general importance in the administration of the Act. This case is an appropriate vehicle for the Court to consider and discuss that important issue.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ISAAC N. GRONER
1730 K Street, N.W.
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:

ALAN Y. COLE
COLE and GRONER
1730 K Street, N.W.
Washington, D. C. 20006

---

the Company filed its petition for review with the Seventh Circuit; but the Company made a motion to transfer the case, which was granted. *Insurance Workers International Union* v. *N.L.R.B.*, 360 F. 2d 823 (D.C. Cir. 1966). Subsequently, in a case involving a bargaining unit of debit insurance agents of the Company in the Commonwealth of Pennsylvania, the Board made a finding that they were employees. *United Insurance Company of America*, 162 NLRB No. 33 (1966). Again, the Union filed the earlier petition for review, with the Third Circuit, and the Company made a motion to transfer to the Seventh Circuit; and we have been advised by the Office of the Clerk of the Third Circuit that the motion has been granted.